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Not Cutting It: The Fourth Circuit's Misapplication of Section 4B1.2(a)(2) of the Sentencing Guidelines in Mobley v. United States

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INTRODUCTION

Congress passed the Sentencing Reform Act of 1984[1] to curtail the amount of discretion federal judges possessed when sentencing convicted criminals[2] in an effort to reduce the disparity in sentencing among similar crimes.[3] With its 2005 decision in *United States v. Booker*,[4] however, the U.S. Supreme Court held that the once-mandatory Federal Sentencing Guidelines were merely advisory.[5] *Booker* marked a return to the pendulous pre-Sentencing Reform Act world of judicial preference, where the sentencing philosophies of individual judges carried significant weight.[6]

In *Mobley v. United States*,[7] Jermaine Mobley was serving a 151-month sentence in federal prison for drug and weapon convictions.[8] In September 2009, Mobley went to the prison infirmary after complaining of numbness and pain in his feet.[9] While there, a physical therapist picked up Mobley's shoe, only to have Mobley grab the shoe and remove an eight-inch "shank"[10] from its insole, attempting

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1. Pub. L. No. 98–473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–3742 and 28 U.S.C. §§ 991–998 (2006)).

2. *See* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1428 (2008) ("A paradigmatic example is the Federal Sentencing Guidelines, whose overriding purpose was to reduce inter-judge sentencing disparity by reducing judicial discretion.").

3. *See* Editorial, *Justice Pendulum Swings*, N.Y. POST, Jan. 14, 2005, at 30 ("Overly lenient judges, of course, are a plague that prompted Congress to pass the 1984 Sentencing Reform Act in the first place.").

4. 543 U.S. 220 (2005).

5. *See id.* at 246 (striking down the mandatory sentencing requirements as unconstitutional under the Sixth Amendment, and instead opting to make the guideline system simply advisory). *But see id.* at 311, 313 (Scalia, J., dissenting) (arguing that the majority's holding will lead to "excessive sentencing disparities" and will "wreak havoc" on the judiciary).

6. *See* Michael W. McConnell, *The* Booker *Mess*, 83 DENV. U. L. REV. 665, 676 (2006) ("One clear effect of *Booker*, then, is to produce a greater degree of regional non-uniformity in sentencing practices.").

7. 687 F.3d 625 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 888 (2013).

8. *Id.* at 626.

9. *Id.*

10. Judge Wynn defines shanks as "crude homemade knives." *Id.* at 635 (Wynn, J., dissenting).

unsuccessfully to hide the shank under an exam table before the prison staff discovered it.[11]

Subsequently, Mobley was arrested for, charged with, and pled guilty to possession of a prohibited object in prison in violation of 18 U.S.C. § 1791(a)(2).[12] According to the advisory Sentencing Guidelines, Mobley's offense warranted a sentence of between twenty-four and thirty months imprisonment.[13] However, the sentencing court enhanced Mobley's sentence pursuant to section 4B1.1 of the Sentencing Guidelines[14] after finding that Mobley qualified under the residual clause of section 4B1.2(a)(2) of having committed a violent crime that automatically triggers a sentence enhancement.[15] Thereafter, the advisory sentencing range increased to between thirty-seven and forty-six months, and the judge sentenced Mobley to an additional thirty-seven months imprisonment.[16]

The Fourth Circuit's decision in *Mobley* showcases the problem of judicial overreaching inherent in an overly discretionary sentencing scheme. The court held by a split vote[17] that Mobley's possession of a prohibited object in prison, namely a shank stored in the insole of his shoe, constituted a "crime of violence" under the residual clause of section 4B1.2(a)(2) of the Sentencing Guidelines sufficient to enhance his sentence to the thirty-seven months Mobley received.[18]

This Recent Development argues first that the Fourth Circuit incorrectly decided *Mobley* by using a utilitarian theory of punishment[19] similar to that employed by the Fifth,[20] Eighth,[21] and

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11. *Id.* at 626 (majority opinion).

12. *Id.*

13. *Id.* at 627.

14. *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(a) (2012) ("A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.").

15. *See Mobley*, 687 F.3d at 627. The term "crime of violence" is defined in the Guidelines as any offense "punishable by imprisonment for a term exceeding one year and that is burglary of a dwelling, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*." *Id.* at 627–28 (emphasis added).

16. *Id.* at 626–27.

17. *Id.* at 626.

18. *Id.* at 628.

19. Although reasonable minds certainly disagree on the effectiveness and validity of utilitarian versus retributivist sentencing philosophies, this Recent Development takes the position that a retributivist sentencing philosophy correctly reflects the goal Congress had

Tenth[22] Circuits. The application of a utilitarian theory in this circumstance is incorrect because it treats the crime of "possession of a weapon" as an inchoate offense. Conversely, the more traditional, retributivist philosophy applied by the Third Circuit[23] treats "possession of a weapon" as too remote in time to be considered an inchoate offense.[24]

Secondly, this Recent Development argues that *Mobley* exemplifies a larger problem, which the Guidelines intended to correct, that still survives post-*Booker*: the residual clause of section 4B1.2(a)(2) provides too much leeway for judges to impose their individual values on the sentencing process in direct contradiction to the purpose of the Sentencing Reform Act of 1984.[25] In fact, the majority in *Mobley* incorrectly employed a utilitarian sentencing philosophy because of this ambiguity. Although the U.S. Supreme Court attempted to clarify the ambiguous residual clause in its 2008 decision *Begay v. United States*,[26] lower courts have continued to struggle to define "violent crimes" with regard to sentencing enhancements.[27] This problem will continue until Congress revisits

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to limit judicial discretion and normalize sentencing across judicial districts when it created the Sentencing Guidelines. Since the late 1960s, indeterminate, utilitarian sentencing guidelines that focused on rehabilitation and individualized sentencing have given way to determinate, retributivist sentencing goals where the seriousness of the offense committed, not the particular individual who committed the crime, determines the gravity of the punishment. *See* Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CALIF. L. REV. 943, 978–79 (1999).

20. *See* United States v. Marquez, 626 F.3d 214, 221 (5th Cir. 2010) (construing the possession of a deadly weapon in prison as a crime of violence by looking at potential future acts the possessor might commit).

21. *See* United States v. Boyce, 633 F.3d 708, 712 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1002 (2012) (finding the defendant's possession of a deadly weapon in prison constituted a violent crime because it enhanced the probability of future violent acts).

22. *See* United States v. Perez-Jiminez, 654 F.3d 1136, 1142 (10th Cir. 2011) (reasoning that possession of a deadly weapon in prison constitutes a crime of violence based on the "serious potential risk of physical injury").

23. *See* United States v. Polk, 577 F.3d 515, 518 (3d Cir. 2009) (concluding that possession of a deadly weapon cannot serve as a predicate crime constituting a crime of violence regardless of the inmate's intentions for the weapon).

24. *See* BLACK'S LAW DICTIONARY 1186–87 (9th ed. 2009) (defining an "inchoate offense" as "[a] step toward the commission of another crime, the step in itself being serious enough to merit punishment. The three inchoate offenses are attempt, conspiracy, and solicitation.").

25. *See supra* notes 2–3 and accompanying text.

26. 553 U.S. 137 (2008). The majority in *Begay* explained that Congress intended for the residual clause to cover crimes similar "in kind as well as in degree of risk posed" to "burglary, arson, extortion, and crimes involving the use of explosives." *Id.* at 137.

27. *Compare* Douglas J. Bench, Jr., *What Constitutes a Violent Felony After* Begay*?*, 67 J. MO. B. 208, 208 (2011) (calling post-*Begay* sentencing a "counter-intuitive world of sentencing pursuant to the Armed Career Criminal Act of 1984"), *with* Recent Case,

the Guidelines to limit the discretionary power afforded sentencing judges by removing the residual clause from the Sentencing Reform Act, and in so doing, makes it clear that possession of a weapon is not an inchoate offense.

Part I of this Recent Development considers how the Third, Fifth, Eighth, and Tenth Circuits have interpreted the Guidelines' problematic residual clause before comparing these interpretations to the Fourth Circuit's decision in *Mobley*. Part II analyzes the Fourth Circuit's suspect treatment in *Mobley* of "possession of a weapon" as an inchoate offense for sentence enhancement purposes in light of constitutional notice requirement concerns and philosophically competing sentencing theories. Part III highlights the issues created by this clause by examining the suitability of the dissent's "rule of lenity" analysis, particularly given that the Guidelines are advisory in a post-*Booker* world. Finally, Part IV concludes by calling for Congress to review the Guidelines to clarify the ambiguous residual clause, in part by recognizing that "possession of a weapon" should not be treated as an inchoate offense, as overly harsh sentences like the one seen in *Mobley* are not consistent with constitutionally mandated notice requirements or the purpose of the residual clause.

I. THE AMBIGUITY OF SECTION 4B1.2(A)(2) OF THE UNITED STATES SENTENCING GUIDELINES

The residual clause of section 4B1.2(a)(2) defines a "crime of violence" as any offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another."[28] Congress intended for these Guidelines to lessen the discretion of federal judges.[29] In so doing, Congress hoped to make federal sentences more uniform across each jurisdiction and provide an element of certainty in sentencing that did not previously exist[30] in an

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Seventh Circuit Holds that Convictions for Failing to Report to Jail Constitute Violent Felonies Under 18 U.S.C. § 924(e)—United States v. Golden, 120 HARV. L. REV. 2012, 2012 (2007) ("Though the phrase 'violent felony' may seem redundant in common parlance, the law should be more discerning. The federal government uses this designation for the purpose of sentencing enhancement, but courts have struggled to contain it. The greatest source of trouble is a catch-all provision sweeping in all felonies that 'otherwise . . . present[] a serious potential risk of physical injury to another.' " (alterations in original)).

28. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2) (2012).

29. *See supra* notes 1–3 and accompanying text.

30. *See* 28 U.S.C. § 991(b)(1)(B) (2006) (stating that the purposes of the United States Sentencing Commission "are to establish sentencing policies and practices for the Federal criminal justice system that . . . provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar

effort to ensure more equitable sentencing across the various circuits.[31] Congress may have meant to limit judicial discretion when establishing the Guidelines, but that effort was not entirely successful. While the imposition of mandatory minimum and mandatory maximum sentences certainly accomplishes the goal of limiting judicial discretion, the inclusion of the broad catch-all residual clause in section 4B1.2(a)(2) gives judges the discretionary flexibility to define what types of actions constitute violent crimes. Despite Congress's intent, the inclusion of the residual clause of section 4B1.2(a)(2) only creates additional confusion highlighted by application of the clause in *Mobley*[32] and in other federal circuit courts.[33]

A. *How the Third, Fifth, Eighth, and Tenth Circuits Interpret 4B1.2(a)(2)*

In *United States v. Marquez*,[34] the Fifth Circuit contended that the similarities between the offenses of possession of a deadly weapon by an inmate and burglary are both in kind and in degree of risk posed.[35] This is because, "[l]ike burglary, the 'main risk' of an inmate in possession of a deadly weapon is 'the possibility of a face-to-face confrontation' with another person."[36]

Similarly, in its decision in *United States v. Boyce*,[37] the Eighth Circuit concluded that "[t]here is no lawful purpose for an inmate to possess an inherently dangerous weapon in a correctional facility."[38] Adding to this trend, the Tenth Circuit, using *Boyce* as support, concluded in *United States v. Perez-Jiminez*[39] that "possessing a dangerous or deadly weapon in prison 'enables violence,' "[40] and

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records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices").

31. *See* Editorial, *supra* note 3, at 30 (taking a historic look at mandatory minimum sentences and finding that "judges in different jurisdictions were handing down wildly divergent sentences for the same crimes—leaving the system vulnerable to charges of unequal application of the law").

32. *See supra* notes 7–10 and accompanying text.

33. *See supra* notes 20–23 and accompanying text; *infra* notes 35–50 and accompanying text.

34. 626 F.3d 214 (5th Cir. 2010).

35. *See id.* at 222 (quoting United States v. Begay, 553 U.S. 137, 143 (2008)).

36. *Id.*

37. 633 F.3d 708 (8th Cir. 2011).

38. *Id.* at 711 (citation omitted).

39. 654 F.3d 1136 (10th Cir. 2011).

40. *Id.* at 1143 (quoting *Boyce*, 633 F.3d at 712).

subsequently determined that possession of a deadly weapon by a prison inmate is inherently a violent crime subject to an enhanced sentence under section 4B1.2(a).[41]

Alternatively, the Third Circuit in *United States v. Polk*[42] found that, "[w]hile possessing a weapon in prison is purposeful, in that we may assume one who possesses a shank intends that possession, it cannot properly be characterized as conduct that is itself aggressive or violent, as only the potential exists for aggressive or violent conduct."[43] Furthermore, the *Polk* court found:

> While no doubt possession of a weapon in prison involves a high degree of risk, *Begay* points out that even a serious potential for injury is not enough to qualify a crime for career offender enhancement; the risk created must also be "similar in kind" to the crimes set out [in section 4B1.2(a)(2)].[44]

In essence, the *Polk* court based its argument on the premise that possession alone cannot be violent, but rather only creates the potential for violence.[45] This application reflects the retributivist philosophy that criminals should be punished only for the actions they take, rather than for the potential damage their actions might cause.[46] This is especially true when there is no indication that the criminal action will have any future effects that might themselves be criminal, as is the case in *Mobley*, where the facts do not indicate any plan Mobley might have had to actively use the shank to incite or deter violence.

Furthermore, the Eighth Circuit's determination that the location of the weapon bears significant weight in the analysis is misguided. The Sentencing Commission classified unlawful possession of the weapons enumerated in the guidelines as violent crimes because of the "inherent *dangerousness* of the weapon—as found by Congress—not *where* the weapon is possessed."[47] Therefore, the determination of "violent and aggressive" conduct, as required by *Begay*, mandates that courts focus on the inherent dangerousness of a

41. *Id.* at 1143–44.

42. 577 F.3d 515 (3d Cir. 2009).

43. *Id.* at 519.

44. *Id.*

45. *See id.* ("The act of possession does not, without more . . . involve any aggressive or violent behavior." (quoting United States v. Archer, 531 F.3d 1347, 1351 (11th Cir. 2008))).

46. *See* Michael S. Moore, *The Moral Worth of Retribution*, *in* PRINCIPLED SENTENCING 110, 110 (Andrew Von Hirsch et al. eds., 3d ed. 2009).

47. United States v. Marquez, 626 F.3d 214, 232 (5th Cir. 2010) (quoting U.S. SENTENCING GUIDELINES MANUAL supp. app. C at 134, amend. 674 (2010)).

weapon, not the location where the weapon is found[48] as both the *Boyce* and *Mobley* courts erroneously do.[49]

Contrary to the Third Circuit approach, *Mobley* joins the approach embraced by the Fifth, Eighth, and Tenth Circuits.[50] This circuit split highlights the residual clause's problematic language[51] and stresses the need for Congress to remove the residual clause from section 4B1.2(a)(2) to eliminate continued confusion.

B. *How the Fourth Circuit Split on 4B1.2(a)(2) in* Mobley

In *Mobley*, the Fourth Circuit adopted particular aspects of the reasoning employed by the Fifth, Eighth, and Tenth Circuits.[52] As noted above, these courts relied on the confusing post-*Begay* standard that requires lower courts to determine how similar the enhancing offense is to burglary, arson, extortion, and crimes involving the use of explosives.[53]

In his opinion for the majority, Judge King held that Mobley's possession of the shank resembled the other enumerated offenses present in section 4B1.2(a)(2), namely burglary. He posited that, "[l]ike the offense of burglary of a dwelling, the availability of contraband weapons in the prison context obviously facilitates violence and injury."[54] Furthermore, King

> readily agree[d] with the Tenth Circuit's summation in *Perez-Jiminez* that '[t]here is no legitimate purpose for a prisoner to carry a weapon designed to kill, injure or disable another. On

48. *See infra* note 130 and accompanying text.

49. *See* United States v. Mobley, 687 F.3d 625, 631 (4th Cir. 2012) (basing the violent and aggressive nature of possession of a prison shank on the determination of *where* the shank was found: prison), *cert. denied*, 133 S. Ct. 888 (2013); United States v. Boyce, 633 F.3d 708, 711 (8th Cir. 2011) ("There is no lawful purpose for an inmate to possess an inherently dangerous weapon in a correctional facility."), *cert. denied*, 132 S. Ct. 1002 (2012). The *Mobley* and *Boyce* majorities are not alone in their analysis that where the weapon is found should be considered more than the inherent dangerousness of the weapon itself. *See* United States v. Perez-Jiminez, 654 F.3d 1136, 1143 (10th Cir. 2011) ("[T]here is no legitimate purpose for a prisoner to carry a weapon designed to kill, injure or disable another."); *Marquez*, 626 F.3d at 225 (basing its decision on the potential violence at risk because the defendant is in prison).

50. *See* Jeremy Bentham, *Punishment and Deterrence*, *in* PRINCIPLED SENTENCING, *supra* note 46, at 53, 54 ("General prevention is effected by the denunciation of punishment, and by its application, which, according to the common expression, *serves for an example*.").

51. *See id.*

52. *See Mobley*, 687 F.3d at 629–31.

53. *See supra* notes 26–27 and accompanying text.

54. *Mobley*, 687 F.3d at 631 (other citations omitted) (citing Shrader v. White, 761 F.2d 975, 991 (4th Cir. 1985) (Sprouse, J., dissenting)).

> the contrary, the only reason to carry such a weapon is to use it to attack another or to deter an attack.'[55]

In his dissent, Judge Wynn criticized the ambiguous nature of the statute's definition of a "violent crime." Judge Wynn contended that because of "the residual clause's ambiguity and the confusion experienced, and created, by the courts, inmates lack sufficient notice that simply possession of a shank constitutes a crime of violence."[56]

Most tellingly, Judge Wynn's criticism pointed to a scenario presented at oral argument where the Government admitted that, under its reasoning, which the majority subsequently adopted, a shank discovered in the empty cell of an inmate would be characterized as a "violent crime" subject to an enhanced sentence under section 4B1.2(a)(2).[57] This split among the Fourth Circuit panel further reveals the philosophical divide present between retributivists and utilitarians as it pertains to the classification of possession of a weapon as a violent crime.

II. THE FOURTH CIRCUIT'S SUSPECT TREATMENT OF "POSSESSION OF A WEAPON" AS AN INCHOATE OFFENSE AND THE UNDERLYING PHILOSOPHICAL JUSTIFICATIONS

The two-to-one split among judges on the *Mobley* court aligns with a difference in underlying, competing sentencing philosophies.[58] This split embodies the sentencing problems that have arisen since *Booker* rendered the Guidelines merely advisory.[59] In *Mobley*, the defendant received an enhanced sentence under the Sentencing Guidelines after the sentencing court determined that possession of a shank by a prison inmate constituted a crime of violence under section 4B1.2(a)(2).[60] Under the auspices of discretion in sentencing and motivated by a utilitarian sentencing philosophy, Judge King's majority opinion equates possession of a dangerous weapon in the

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55. *Id.* (quoting United States v. Perez-Jiminez, 654 F.3d 1136, 1143 (10th Cir. 2011)).

56. *Id.* at 636 (Wynn, J., dissenting).

57. *Id.* at 634.

58. *Compare infra* Part III.A (analyzing *Mobley* from the majority's utilitarian perspective), *with infra* Part III.B (analyzing *Mobley* from the dissent's retributivist perspective).

59. *See* E.J. (Evelio Jesús) Yera, Blakely, Apprendi, Booker, Begay, *and* Santos: *Judicial Minimalism and the U.S. Supreme Court's Ill-Conceived Attempts at a Rational Jurisprudence*, 22 ST. THOMAS L. REV. 87, 97 (2009) (finding that various post-*Booker* sentencing challenges resulting in "a windfall for defendants" came as a result of the uncertainty created by *Booker*).

60. *See Mobley*, 687 F.3d at 627–28.

context of a prison setting to an inchoate offense.[61] The majority uses the prison setting to justify an otherwise incorrect interpretation of possession as an inchoate crime in hopes that enhanced punishments will deter future criminal possession by prison inmates. Utilitarians, like the majority in *Mobley*, justify punishment as a means to deter future crime by both the immediate offender and potential future offenders.[62] Thus, Judge King erroneously conflates the *potential* for violence created by mere possession itself with an actual violent crime.[63]

Conversely, Judge Wynn's dissent embodies a retributivist sentencing philosophy[64] that refuses to conflate the potential risk of violence with violent conduct for the purpose of punishment.[65] A retributivist, like Judge Wynn in *Mobley*, looks backward in time to justify punishment because "[i]t is morally fitting that an offender should suffer in proportion to [his] desert or culpable wrongdoing."[66] The retributivist is unconcerned with any deterrent effects the punishment may have in the future.[67] These philosophical differences are heightened by the unconstitutional sentence enhancement that results from the majority's treatment of mere possession of a weapon as a violent crime. Moreover, these differences also highlight the problems associated with the post-*Booker* return to discretionary sentencing Congress attempted to curtail with the Sentencing Reform Act.

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61. *See id.* at 631–32.

62. *See* Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315, 320 (1984).

63. *See Mobley*, 687 F.3d at 631–32 (concluding that the potential risk posed by possession of a shank in prison constitutes a crime of violence under the residual clause of section 4B1.2(a)(2)).

64. *See* Jeffrie G. Murphy, *Retributivism and the State's Interest in Punishment*, *in* CRIMINAL JUSTICE: NOMOS XXVII, at 156, 158–59 (J. Roland Pennock & John W. Chapman, eds. 1985) ("[T]he retributivist seeks, not primarily for the socially useful punishment, but for the *just* punishment, the punishment that the criminal (given his wrongdoing) deserves or merits, the punishment that society has a right to inflict and the criminal a right to demand."); *see also* Andrew Von Hirsch, *Proportionate Sentences*, *in* PRINCIPLED SENTENCING, *supra* note 46, at 115, 119 ("Equity is sacrificed when the proportionality principle is disregarded, even when this is done for the sake of crime prevention.").

65. *See Mobley*, 687 F.3d at 632 (Wynn, J., dissenting) (noting that the *possession* of a shank is too dissimilar to the violent offenses enumerated in the relevant provision of 4B1.2(a)(2) to justify the majority's determination that possession of a shank in prison is a violent crime subject to a sentence enhancement).

66. Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 860 (2002).

67. *See id.* at 859–60.

III. POSSESSION IS NOT AN INCHOATE OFFENSE

An inchoate offense is "[a] step toward the commission of another crime, the step in itself being serious enough to merit punishment."[68] Society punishes inchoate offenses when the actor's conduct reflects a firm commitment to commit harm,[69] even though the harm has not yet resulted. That is, society punishes a wrongdoer for an incomplete offense because it determines that the *potential* risk for harm arises to a level meriting public admonishment.[70] Successful, completed crimes are usually punished more severely than inchoate, incomplete crimes because the social harm of a completed crime is perceived to outweigh the social harm present in an incomplete offense.[71]

Recognized inchoate crimes are conspiracy, attempt, and solicitation.[72] Possession is an altogether different offense in which society punishes an actor for having, either constructively or physically, certain prohibited articles.[73] Possession is not punished based on an overt action leading toward the commission of another crime like inchoate offenses,[74] but rather because the wrongdoer unlawfully possesses a prohibited article.[75] Possession may be punishable separately and prior to any conduct constituting an inchoate offense.[76]

Conflating possession with inchoate offenses creates serious due process concerns. "A person's right to reasonable notice of a charge

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68. BLACK'S LAW DICTIONARY 1186–87 (9th ed. 2009).

69. Michael T. Cahill, *Defining Inchoate Crime: An Incomplete Attempt*, 9 OHIO ST. J. CRIM. L. 751, 755 (2012).

70. *See id.*

71. *See* Larry Alexander, *Crime and Culpability*, 5 J. CONTEMP. LEGAL ISSUES 1, 1 (1994) (recognizing that, under the Model Penal Code, which generally "prescribes the same punishment for attempts as for successes, murder receives more punishment than attempted murder," and that "most states go beyond the Model Penal Code in more severely punishing successful crimes").

72. *See supra* note 24; *see also* Williams v. United States, 553 U.S. 285, 300 (2008) (noting that attempt and conspiracy, in addition to solicitation, are inchoate offenses).

73. *See Williams*, 553 U.S. at 300 (defining inchoate crimes as "acts looking toward the commission of another crime"); *see also* BLACK'S LAW DICTIONARY 1281–83 (9th ed. 2009) (defining possessory crimes).

74. *See* United States v. Shabani, 513 U.S. 10, 16 (1994) (finding that the agreement to commit an unlawful act is the actus reus required to punish an inchoate offense).

75. *See generally* United States v. Barton, 633 F.3d 168 (3d. Cir. 2011) (finding constitutional a prohibition on gun possession and enforcing that prohibition simply because the defendant had actual possession of the weapon).

76. *See* Kimberly Kessler Ferzan, *Inchoate Crimes at the Prevention/Punishment Divide*, 48 SAN DIEGO L. REV. 1273, 1277 (2011) (giving a hypothetical where an actor may be punished for possession as a preparatory offense although the conduct does not yet constitute an attempt).

against him, and an opportunity to be heard in his defense . . . are basic in our system of jurisprudence."[77] Although imprisoned, inmates retain certain due process rights enumerated in the Constitution,[78] including but not limited to a protected liberty interest.[79] An inmate is constitutionally entitled to protection of a state-created liberty interest "where the State's action will inevitably affect the duration of his sentence."[80] In the context of *Mobley*, the Due Process Clause of the Constitution should have protected Mobley from being punished for an inchoate offense after being convicted of possession of a prohibited object in prison. "Approving the enforcement of a sentencing statute that does not 'give a person of ordinarily intelligence fair notice' of its reach, and that permits, indeed invites, arbitrary enforcement" is unconstitutional.[81] The equation of possession of a weapon with an inchoate offense results in the punishment of possession under the guise of an inchoate offense, effectively allowing courts to punish wrongdoers guilty of possession as if they had committed an inchoate offense.

A. Mobley*'s Enhancement and the Majority's Utilitarian Perspective*

1. The Utilitarian Sentencing Philosophy and the Residual Clause

The majority's mischaracterization of possession of a weapon as a violent crime is grounded in a utilitarian sentencing philosophy aimed at deterring similar acts.[82] In the context of *Mobley*, this deterrent-based philosophy is inherently problematic. In conflating the potential for violence presented by a prisoner's possession of a shank in prison with an actually violent action, like stabbing, the majority implemented a utilitarian sentencing philosophy focused

77. *In re* Oliver, 333 U.S. 257, 273 (1948).

78. *See* U.S. CONST. amends. V, XIV; *see also* Wilkinson v. Austin, 545 U.S. 209, 220–24 (2005) (determining that the Due Process Clauses of the Fifth and Fourteenth Amendments prohibit the government from infringing on a prisoner's liberty interest without due process of law).

79. *See Wilkinson*, 545 U.S. at 220–24.

80. *See* Sandin v. Conner, 515 U.S. 472, 487 (1995) (ruling that defendant Conner's situation did not present a case where the state action would undoubtedly affect the length of his sentence).

81. Sykes v. United States, 131 S. Ct. 2267, 2287 (2011) (Scalia, J., dissenting) (criticizing the vague and arbitrary nature of the residual clause).

82. *See generally Deterrence*, *in* PRINCIPLED SENTENCING, *supra* note 46, at 39, 40 ("Special deterrence is aimed at the particular offender before the court; general deterrence seeks to influence the behaviour of other potential offenders in the population. Both objectives employ the mechanism of fear: the threat of punishment (or further punishment in the case of individual deterrence) acts as a deterrent.").

primarily on potential consequences that may not come to pass.[83] Underlying the *Mobley* majority's holding, then, is a belief that enhancement here was justified because the crime of possession took place inside prison walls.[84] This position cannot be sustained.

The majority's reliance on its utilitarian punishment theory is made possible by the ambiguous nature of the residual clause of section 4B1.2(a)(2).[85] Section 4B1.2(a) defines a crime of violence as one that

> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.[86]

This language has prompted the Supreme Court to adopt a piecemeal approach to determine what is and is not a violent crime under the residual clause.[87] On certain occasions, the Court has taken a categorical approach whereby it compares an unenumerated offense to those offenses enumerated as violent crimes in section 4B1.2(a)(2).[88] Additionally, the Court has found that violent crimes

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83. *See* Matthew Haist, *Deterrence in a Sea of "Just Deserts": Are Utilitarian Goals Achievable in a World of "Limiting Retributivism"?*, 99 J. CRIM. L. & CRIMINOLOGY 789, 794 (2009) (noting that "utilitarian theories are sometimes referred to as 'consequentialist' because they are concerned solely with how punishment will affect future actions and with society's future aggregate happiness").

84. *See* United States v. Mobley, 687 F.3d 625, 631–32 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 888 (2013). The majority provides further evidence that it intended to limit its holding to a prison setting by recognizing that unlawful possession of a firearm by a felon does not constitute a violent crime subject to sentence enhancement. *Id.* at 628–29 (citing U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 cmt. n.1 (2012)).

85. *See supra* notes 29–33 and accompanying text.

86. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(1)–(2).

87. *See generally* Sykes v. United States, 131 S. Ct. 2267 (2011) (recognizing the categorical approach taken previously as well as the *Begay* test but favoring a conduct-based approach to determine whether felony vehicle flight is properly categorized as a violent felony); Chambers v. United States, 555 U.S. 122 (2009) (furthering the categorical approach method); Begay v. United States, 553 U.S. 137 (2008) (creating the test that requires violent crimes to be "purposeful, violent, and aggressive"); James v. United States, 550 U.S. 192 (2007) (taking a categorical approach to determine whether Congress sought to exclude particular offenses from the residual clause in 4B1.2(a)(2)).

88. *See Chambers*, 555 U.S. at 126 (holding that the categorical approach requires sentencing courts to consider the generic nature of the crime committed rather than the specific nature of the crime before it); *James*, 550 U.S. at 215 (Scalia, J., dissenting) (defining the majority's categorical approach as one where "the sentencer should compare the unenumerated offense at issue with the 'closest analog' among the four offenses that are set forth (burglary, arson, extortion, and crimes involving the use of explosives), and should include the unenumerated offense within ACCA if the risk it poses is 'comparable' ").

are those crimes that are "purposeful, violent, and aggressive."[89] However, the Supreme Court has also recognized a conduct-based approach whereby actions that create a substantial risk to others may be punished as violent crimes under the residual clause.[90] The current circuit split in interpreting this residual clause is a direct result of the Supreme Court's inability to identify a bright-line rule based on guidelines that invite arbitrary judicial discretion in direct contradiction to congressional purpose.[91] In *Mobley*, the Fourth Circuit, being able to use the utilitarian sentencing philosophy in part because of the ambiguity of the residual clause, incorrectly applies all three of these tests to determine when a crime is violent under the residual clause.

2. The Majority's Incorrect Application of the Categorical Approach

In part, the *Mobley* majority relies on a misinterpretation of *Begay v. United States*. In *Begay*, the Supreme Court held that the felony offense of driving under the influence of alcohol is not a violent felony subject to an enhanced sentence.[92] The Court held that an unenumerated offense would fall within the purview of the residual clause of section 4B1.2(a)(2) if it is "similar, in kind as well as in degree of risk posed, to the examples"[93] given in that section, namely burglary, arson, extortion, and crimes involving the use of explosives.[94]

The *Mobley* court fails to establish that possessing a shank is a crime Congress intended to punish in the residual clause of the Sentencing Guidelines. *Begay* requires the offense in question to be similar in kind and in degree of risk posed to the enumerated offenses put forth in section 4B1.2(a)(2) before enhancement is allowed.[95] The majority contends that possession of a shank by an inmate in prison "involve[s] a similar level of potential violence and aggression reflected in the possession of the weapons, such as a sawed-off shotgun, specified in 26 U.S.C. § 5845(a)."[96] Despite this assertion,

89. *Begay*, 553 U.S. at 145.

90. *See Sykes*, 131 S. Ct. at 2274 (finding that "[r]isk of violence is inherent to vehicle flight," the crime committed by Sykes).

91. *See supra* notes 1–3 and accompanying text.

92. *See Begay*, 553 U.S. at 139.

93. *Id.* at 143.

94. *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2) (2012).

95. *See Begay*, 553 U.S. at 142–43.

96. *See* United States v. Mobley, 687 F.3d 625, 631 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 888 (2013).

the opinion gives little guidance as to why a prison shank and a sawed-off shotgun are similar in kind and degree of risk posed.[97] In comparing the criminal possession of a sawed-off shotgun with that of a shank by a prison inmate, the majority argues that "[b]oth of these crimes prohibit the possession of dangerous weapons in contexts where they have no lawful purpose."[98]

This argument falls flat, however, because, as the majority also makes clear, not all unlawful possessions of a firearm constitute a "crime of violence" under the language of the Sentencing Guidelines.[99] Thus, the majority fails to determine what makes unlawful possession of some, but not all, firearms "crimes of violence." Without this determination, the majority cannot properly explain why criminal possession of a shank by a prison inmate is similar in kind and in degree of risk posed to criminal possession of a sawed-off shotgun. This reading of *Begay* highlights that the majority is basing its sentencing decision solely on a utilitarian philosophy, which aims to punish Mobley not for his actual conduct, but rather for the *potential* risk that possession of a shank in prison poses.[100]

Ultimately, the *Mobley* court unsuccessfully attempts to soothe the utilitarian sting of its holding and its reading of *Begay* by limiting the enhancement penalty to possessions of weapons that take place in the prison setting.[101] Judge King supports his utilitarian perspective on sentencing by noting that " '[t]here is no legitimate purpose for a prisoner to carry a weapon designed to kill, injure or disable another. On the contrary, the only reason to carry such a weapon is to use it to attack another or to deter an attack.' "[102] Though Judge King "recognize[s] that 'it is virtually impossible to eliminate violence among the incarcerated,' "[103] his opinion errs on the side of an enhanced penalty in a situation in which the crime involved no actual or threatened violence simply because it happened inside prison

97. *See id.* (comparing the crimes of possessing sawed-off shotguns and possessing prison shanks only to the extent that they "prohibit the possession of dangerous weapons in contexts where they have no lawful purpose").

98. *Id.*

99. *Id.* at 629 (limiting the type of firearm for purposes of section 4B1.2 to those firearms, like the sawed-off shotgun, described in 26 U.S.C. § 5845(a) (2006)).

100. *Id.* at 631–32 ("We are therefore firmly of the view that Mobley's offense of conviction 'presents a serious potential risk of physical injury to another,' and that his offense of conviction constitutes a crime of violence for purposes of the career offender enhancement." (quoting U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2) (2012))).

101. *See supra* notes 83–85 and accompanying text.

102. *Mobley*, 687 F.3d at 631 (quoting United States v. Perez-Jiminez, 654 F.3d 1136, 1143 (10th Cir. 2011)).

103. *Id.* at 631 (quoting Taylor v. Freeman, 34 F.3d 266, 273 n.6 (4th Cir. 1994)).

walls. Thus, in order to justify the enhanced sentence here, the majority equates mere possession of a weapon with actual violence, focusing on the lack of legitimate purpose for having a shank in prison.

This is inconsistent with congressional purpose—to define certain crimes as particularly violent such that an enhanced sentence is merited[104]—as well as with the Supreme Court's determination in *Begay* that the crime must be "similar, in kind as well as in degree of risk posed, to the examples" given in section 4B1.2(a)(2) of the Sentencing Guidelines.[105] As Judge Wynn notes:

> The statutory purpose of the career offender provision, as expressed in its title, is to provide enhanced sentencing for career criminals. Yet nothing indicates that prisoners who possess shanks are career offenders engaged in violent crimes, as opposed to, e.g., ordinary inmates in jail on non-violent drug charges with a crude weapon made for self-defense purposes only.[106]

Furthermore, the majority incorrectly categorizes mere possession as an inchoate violent crime, improperly conflating the possession with an "act[] looking toward the commission of another crime."[107] This inconsistency could easily be resolved by removing the residual clause from the Guidelines, leaving instead the clearly enumerated crimes that constitute violent crimes for enhanced sentencing purposes.

3. The Majority's Incorrect Application of the "Purposeful, Violent, and Aggressive" Approach

The majority also fails to establish that Mobley's possession of the shank was purposeful. Under the Court's decision in *Begay*, an enhancing offense derived from the residual clause of 4B1.2(a)(2) must be "purposeful, violent, and aggressive."[108] The "purposeful"

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104. Begay v. United States, 553 U.S. 137, 142 (2008) ("If Congress meant . . . the statute to be all-encompassing, it is hard to see why it would have needed to include the examples at all.").

105. *Id.* at 143.

106. *Mobley*, 687 F.3d at 635 (Wynn, J., dissenting).

107. Williams v. United States, 553 U.S. 285, 300 (2008). For further information, compare this Supreme Court definition of an inchoate offense with the *Mobley* court's treatment of Mobley's sentence enhancement. *Mobley*, 687 F.3d at 632 n.7 ("The residual clause encompasses conduct that creates a serious potential risk of injury to another, and, as we have already explained, the possession of a shank in prison plainly creates such a risk.").

108. *Begay*, 553 U.S. at 144–45 (requiring enhancement offenses to be "purposeful, violent, and aggressive"). As will be shown below, mere possession of a shank in prison by

requirement speaks to the specific mens rea a person must have before an enhanced punishment is merited.[109] The purposeful mens rea element is achieved "with respect to a result if [a person's] conscious objective is to cause such a result."[110] Purposeful and knowingly are distinct levels of criminal culpability,[111] and an actor cannot be convicted of a statute requiring a "purposeful" level of mens rea if only "knowingly" is proved.

At oral argument in *Mobley*, the Government effectively conceded that inmates who are "knowingly" in possession of shanks in prison could be held liable,[112] an argument that the majority did not repudiate. The attachment of "knowingly" as the mens rea to possessory crimes committed under 18 U.S.C. § 1791(a)(2)[113] by inmates is consistent with its application elsewhere.[114] Mobley's culpability level, therefore, does not clearly rise to the level *Begay* requires. Although at least one other circuit court decision upon which the Fourth Circuit's decision relies questions whether possession of a shank in prison is a "violent crime" according to the *Begay* standard,[115] the Fourth Circuit only used *Begay* to justify its

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an inmate is neither violent nor aggressive under a correct application of *Begay* in light of relevant congressional intent. *See infra* Part III.B. However, because the majority's analysis fails to adequately demonstrate that Mr. Mobley's conduct is purposeful, it is not necessary to analyze the violence or the aggressiveness of the possessory offense here.

109. *See Begay*, 553 U.S. at 144–45. The *Begay* majority provided multiple examples that demonstrate the intention for "purposeful" to reflect the mental state of the offender. *Id.* at 145 (providing that "burglary" is with "*intent* to commit a crime"; "arson" is "with the *purpose* of"; and "extortion" is "*purposely* obtaining property" (emphasis added) (citations omitted) (internal quotation marks omitted)).

110. Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 818–19 (1980).

111. *See id.* ("People act 'purposely' with respect to a result if their conscious objective is to cause such a result. People act 'knowingly' with respect to the result if it is not their conscious objective, yet they are practically certain or aware of a high probability that their conduct will cause the result.").

112. *Mobley*, 687 F.3d at 634 (Wynn, J., dissenting) ("Indeed, the Government conceded at oral argument that its reasoning would allow prosecutors to seek enhanced sentencing of an inmate if a shank is discovered in his cell during a search for which he is not even present.").

113. Mobley was originally convicted for violating 18 U.S.C. § 1791(a)(2) (2006). *Id.* at 626 (majority opinion).

114. United States v. Perez-Jiminez, 654 F.3d 1136, 1139 n.1 (10th Cir. 2011) ("Although the statute does not contain an express *mens rea* element, we have held that 'a violation of section 1791 must be committed knowingly.' " (citation omitted) (internal quotation marks omitted)); United States v. Fox, 845 F.2d 152, 155 (7th Cir. 1988) ("Accordingly, we must conclude that the language of § 1791(a) indicates that Congress intended the *mens rea* element of the crime set forth in § 1791(a)(2) to be a 'knowing' or 'intentional' state of mind.").

115. *Perez-Jiminez*, 654 F.3d at 1142 n.4 ("As noted, 18 U.S.C. § 1791 requires a 'knowing' mens rea. Therefore, although we do not decide the question, *Begay*'s

affirmation of the sentencing court's decision in *Mobley* by incorrectly equating "knowingly" with the "purposeful" mens rea requirement *Begay* demands.

4. The Majority's Misapplication of the Conduct-Based Approach

Although less extensively than on *Begay*, the Fourth Circuit's analysis depends in part on *Sykes v. United States*,[116] which takes the conduct-based approach to determine if a crime is one of violence under the residual clause by asking whether "[s]erious and substantial risks are . . . inherent" to the committed crime.[117]

In *Sykes*, the Supreme Court compared the degree of risk of intentional vehicular flight to the degree of risk in the enumerated offenses, holding that the inherent risk of violence of intentional vehicular flight is at least as great as that of burglary and arson, two enumerated offenses.[118] In *Mobley*, the Fourth Circuit compared the possession of the shank with the enumerated offense of burglary, finding that possession of a weapon in prison enables violence, and similar to burglary, "the main risk of an inmate in possession of a deadly weapon is the possibility of a face-to-face confrontation with another person."[119]

However, as Judge Wynn points out in his dissent, "there is a fundamental difference between the 'purposeful, violent, and aggressive' enumerated offenses and the 'passive crime[]' of mere possession."[120] The majority erroneously substitutes the risk of any future violence that may occur for the inaction that mere possession of the weapon presents. That is, from a conduct-based approach, it is incorrect to equate the conduct of simply possessing a weapon with conduct that involves the active use of that weapon.

'purposeful, violent, and aggressive' test . . . may no longer apply to offenses like the one at issue here." (citation omitted)). In *Perez-Jiminez*, the Tenth Circuit relied on its own precedent that allowed it to make a conduct-specific inquiry into whether the defendant's possession of a shank in prison constituted a "crime of violence" under section 4B1.2(a)(2). *Id.* at 1140. It may be assumed from the lack of any similar analysis that the *Mobley* majority could not make an argument analogous to *Perez-Jiminez*'s conduct-specific inquiry for want of similar jurisdictionally specific precedent.

116. 131 S. Ct. 2267 (2011).

117. *See id.* at 2276.

118. *See id.* at 2274–75.

119. *See Mobley*, 687 F.3d at 630 (citations omitted) (internal quotation marks omitted).

120. *Id.* at 634 (Wynn, J., dissenting) (quoting United States v. Polk, 577 F.3d 515, 519 (3d Cir. 2009)).

B. *Mobley's Enhancement from the Dissent's Retributivist Perspective*

Distinct from the utilitarian notion of general deterrence[121] is the retributivist philosophy that the only necessary justification for punishment is that offenders merit the "just desserts" of their actions.[122] That is, society punishes only because "[i]t is morally fitting that an offender should suffer in proportion to [his] desert or culpable wrongdoing."[123]

First, Judge Wynn's dissent[124] follows this classical, retributivist sentencing philosophy by refusing to categorize the potential risks of harm presented by "mere possession" as a "crime of violence."[125] In rebutting the majority's supposition that possession of a shank in prison constitutes "purposeful, violent, and aggressive" conduct as required by *Begay*, Judge Wynn vis-à-vis the Supreme Court's decision in *Chambers v. United States*[126] concludes that where a "crime amounts to a form of inaction, a far cry from the 'purposeful, violent, and aggressive' conduct potentially at issue when an offender [commits one of the enumerated offenses in 4B1.2(a)(2)]," the passivity of the crime in question must render the crime nonviolent.[127] It follows that "[p]risoners [like Mobley] charged with possession alone need not have attempted, or even threatened, to harm anyone."[128] It has been posited that "[b]y most standards of proximity, none of [the possession] offenses would constitute an attempt to commit a specific completed crime. The act of obtaining [a dangerous weapon] comes at least a step prior to the act of using it to commit a crime."[129]

Moreover, Judge Wynn's dissent refutes the argument "that the prison context somehow transforms a shank into an extremely dangerous weapon" because prisoners are not lawfully allowed to

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121. *See supra* note 83 and accompanying text.

122. *See, e.g.*, IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT 197–98 (Augustus M. Kelley Publishers 1974) (1887) (arguing that the only punishment permitted for murder is execution of the murderer).

123. Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 860 (2002).

124. *Mobley*, 687 F.3d at 632–37 (Wynn, J., dissenting).

125. *Id.* at 632.

126. 555 U.S. 122 (2009) (addressing whether the defendant's failure to report for confinement constituted a violent crime under the Sentencing Guidelines).

127. Mobley, 687 F.3d at 633 (Wynn, J., dissenting) (quoting *Chambers*, 555 U.S. at 128).

128. *Id.* at 634 (footnote omitted).

129. Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 100 (1989).

possess weapons, regardless of purpose.[130] In so doing, Judge Wynn points out the problems with disparate and overly discretionary sentencing that the controversial residual clause imputes on federal sentencing jurisprudence, which has been criticized elsewhere as "ad hoc judgment[s] that will sow further confusion."[131] As noted by the majority, Congress did not intend for possession of any weapon to constitute a violent crime,[132] but rather, as the dissent notes, limited its focus to "inherently dangerous" weapons that "serve only violent purposes" when possessed unlawfully.[133] Not only are shanks not included on the list promulgated in the Sentencing Guidelines,[134] but also shanks "are entirely dissimilar to the weapons that are included."[135] The dissent in *United States v. Marquez*[136] aptly noted that "the definition of the [relevant] offense of possession of a deadly weapon by an inmate . . . clearly makes it a purely passive, possessory crime, requiring no . . . violence or aggression."[137] The determination of "violent and aggressive" conduct, as required by *Begay*, mandates that courts focus on the inherent dangerousness of a weapon, not the location where the weapon is found as the *Mobley* majority erroneously does.

IV. SOLVING THE PROBLEM OF *MOBLEY*

Absent congressional intervention to clarify the sentencing guidelines, the "rule of lenity" should apply to disfavor enhancements in situations like that faced by Mobley. The following two subsections address (1) the applicability of the rule of lenity in this context and (2) a proposed legislative solution to resolve the circuit split in a manner that maintains the original congressional intent of limiting judicial discretion.

130. *Mobley*, 687 F.3d at 634 (Wynn, J., dissenting); *see also id.* at 635 (stating that the possession of a shank in prison by a non-violent offender for the sole purpose of self-defense does not fit within the purpose of the statute at issue).

131. Sykes v. United States, 131 S. Ct. 2267, 2284 (2011) (Scalia, J., dissenting).

132. *Mobley*, 687 F.3d at 629.

133. *Id.* at 635 (Wynn, J., dissenting) (quoting United States v. Marquez, 626 F.3d 214, 232 (5th Cir. 2010) (Dennis, J., dissenting) (refuting the majority's determination that possession of a cudgel made of dried paper magazine is a crime of violence under the residual clause)).

134. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 cmt. n.1 (2012) (listing "a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun" as examples of weapons whose possession qualifies as a violent crime).

135. *Mobley*, 687 F.3d at 635 (Wynn, J., dissenting).

136. 626 F.3d 214 (5th Cir. 2010).

137. *Id.* at 232 (Dennis, J., dissenting).

A. *The Court's Solution: The Rule of Lenity*

By invoking the rule of lenity to solve the due process concerns that arise out of the vagueness and ambiguity of the residual clause, the courts could prevent the sentences of people like Mobley from being unfairly enhanced. The "policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended."[138] Where two reasonable interpretations exist to explain an otherwise ambiguous statute, the interpretation most beneficial to the defendant should prevail.[139] As the Supreme Court has noted, "Where Congress has manifested its intention, [the Court] may not manufacture ambiguity in order to defeat that intent."[140] Conversely, where the purpose of a penal statute is ripe with ambiguity, "[t]he rule of lenity serves as an important safeguard of defendants' constitutional rights by ensuring that they receive notice"[141] as required by the Due Process Clause of the Fifth Amendment.[142] Judge Wynn correctly argued that the Fourth Circuit should have applied the rule of lenity here, thereby construing the ambiguous residual clause in favor of Mobley.[143]

Judge Wynn's discussion of the rule of lenity focused primarily on how the return to autonomous judicial discretion post-*Booker* coupled with ambiguity in the sentence enhancement statute leads judges to issue unfair sentences. It is clear that, "[w]hen a penal statute is ambiguous, [the Fourth Circuit is] '*obliged* to apply the rule of lenity and resolve the conflict in the defendant's favor.' "[144] After the Supreme Court decided *Booker*, the mandatory sentences promulgated by the Sentencing Guidelines became merely

138. Bifulco v. United States, 447 U.S. 381, 387 (1980).

139. *See, e.g.*, Rewis v. United States, 401 U.S. 808, 812 (1971) (citing Bell v. United States, 349 U.S. 81, 83 (1955)) (stating that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity").

140. *Bifulco*, 447 U.S. at 387.

141. United States v. Mobley, 687 F.3d 625, 635 (4th Cir. 2012) (Wynn, J., dissenting), *cert. denied*, 133 S. Ct. 888 (2013).

142. United States v. Harris, 347 U.S. 612, 617 (1954) (holding unconstitutional a "criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute").

143. *See Mobley*, 687 F.3d at 636 (Wynn, J., dissenting); *see also* United States v. Munn, 595 F.3d 183, 194 (4th Cir. 2010) (holding that "in the face of any such ambiguity, [the court] would be *obliged* to apply the rule of lenity and resolve the conflict in the defendant's favor").

144. *Mobley*, 687 F.3d at 635 (Wynn, J., dissenting) (quoting *Munn*, 595 F.3d at 194).

advisory.[145] Data collected shortly after *Booker* indicated that the now-discretionary nature of federal sentencing led federal district court judges to err on the side of severity rather than lenity in their sentencing decisions.[146] However, the advisory nature of the Sentencing Guidelines does not eliminate the possibility that the rule of lenity might be applied in particular circumstances. Therefore, the increased discretion afforded to trial court judges should not limit the ability of a reviewing appellate court to invoke the rule of lenity to decrease a defendant's sentence. The *Mobley* majority's failure to address the rule of lenity does a profound disservice to solving the problem of the ambiguous nature of the residual clause in section 4B1.2(a)(2) of the Sentencing Guidelines.

It is important that the rule of lenity be applied in cases like *Mobley* for a variety of reasons. As discussed, the retributivist sentencing philosophy makes more sense in the context of *Mobley* than the majority's use of a utilitarian viewpoint.[147] The application of the rule of lenity in the context of the ambiguity present in the residual clause of section 4B1.2(a)(2) ensures that the sentences of defendants like Mobley are not unjustly and unlawfully enhanced in an effort to deter similar offenses in the future. Instead, the rule of lenity will ensure that defendants like Mobley are punished only for the actions they have been found guilty of committing. As previously noted, the majority in *Mobley* incorrectly confuses the location of the weapon with the inherent dangerousness posed by a rudimentary, homemade knife.[148] Furthermore, the majority's characterization of possession as an inchoate offense improperly turns a passive crime into an action resembling a more active offense like attempt. Applying the rule of lenity in this context would avoid this flawed interpretation.

Next, in light of the overly ambiguous nature of the residual clause at issue in *Mobley*, Judge Wynn's plea to apply the rule of lenity highlights that ambiguity and places Congress on notice that its legislation has potential constitutional notice issues that need to be addressed. Congress should read cases decided on the basis of the

145. *See supra* notes 4–5 and accompanying text.

146. *See* Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155, 167–68 (2005).

147. *See, e.g.*, Susan F. Mandiberg, *Fault Lines in the Clean Water Act: Criminal Enforcement, Continuing Violations, and Mental State*, 33 ENVTL. L. 173, 201 (2003) ("The rule of lenity in [the context of the enforcement of the Clean Water Act] fulfills retributive motives because it ensures that only those aware of moral wrongdoing in a somewhat traditional sense will be . . . treated accordingly.").

148. *See supra* notes 60–63 and accompanying text.

rule of lenity to implement proactive measures that ensure that its legislation complies with the Constitution. Conversely, Congress's failure to thus far address the ambiguity readily identifiable in the residual clause of section 4B1.2(a)(2) will result in the continued conflation of piecemeal approaches that would force the Supreme Court to make "dozens of grants of certiorari, to allocate all the Nation's crimes" as being either violent or non-violent,[149] while at the same time failing to address the continued uncertainty as to whether a defendant's constitutional right to notice has been violated.

The indefinite nature of what constitutes a "violent crime" within the residual clause of section 4B1.2(a)(2) highlights the ambiguity present within that definition. This is evidenced by the varying tests employed[150] and results reached.[151] Because the Guidelines are ambiguous, "inmates lack sufficient notice that simple possession of a shank constitutes a crime of violence,"[152] and the Fourth Circuit is therefore obligated to apply the rule of lenity to protect Mr. Mobley's constitutional rights. While the application of the rule of lenity should have prevented the Fourth Circuit from enhancing Mobley's sentence, the invocation of the rule of lenity is merely a stopgap measure that offers case-by-case corrections but fails to comprehensively address the underlying problem—the ambiguous nature of the residual clause in section 4B1.2(a)(2). A complete overhaul of jurisprudence involving the residual clause could render the clause moot if courts applied the rule of lenity across the board, ruling in favor of the defendant each time the residual clause was at issue. This draconian method would effectively overrule the various approaches the Court has taken to address the clause. However, it would secure a bright line for lower courts to use as guidance when determining what crimes are considered violent under the Sentencing Reform Act. Subsequently, Congress could either act to clarify the controversial residual clause or allow the courts to proceed with only the enumerated offenses recognized as violent crimes. Nevertheless, congressional action still remains the most sensible means for addressing the ambiguity in the residual clause, even if it is not the most likely means for doing so.

149. James v. United States, 550 U.S. 192, 216 (2007) (Scalia, J., dissenting).

150. *See* discussions *supra* Parts III.A.1, III.B.

151. *See supra* Part I.A.

152. United States v. Mobley, 687 F.3d 625, 636 (4th Cir. 2012) (Wynn, J., dissenting), *cert. denied*, 133 S. Ct. 888 (2013).

B. *The Congressional Fix: Deleting the Residual Clause*

Judge Wynn rightly points out the problematic nature of the residual clause at issue in *Mobley*. This clause "calls out for legislative clarification"[153] and has been criticized as a "drafting failure [that should be] declare[d] void for vagueness."[154] Indeed, "[i]t will take decades, and dozens of grants of certiorari, to allocate all the Nation's crimes to one or the other side of this . . . entirely indeterminate line."[155] The arbitrary, ad hoc determinations by the various circuit courts of what constitutes a "violent crime" will continue for the foreseeable future if Congress does not revisit the ambiguity in the residual clause.

It is well within the power of Congress to revisit previously passed legislation containing ambiguous language for the purposes of providing clarity. Although the residual clause "may be a poorly drafted statute[,] . . . rewriting it is a job for Congress, if it is so inclined, and not for [the Supreme Court]."[156] Indeed, the Court's denial of certiorari[157] further indicates that the proper place for revision is with Congress. Should Congress decide to revisit the residual clause, it would be particularly instructive to consider that possession is not an inchoate crime and should not be punished as such,[158] and that the post-*Booker* advisory nature of the Sentencing Guidelines[159] calls out for an increased amount of specificity for the types of crimes that merit an enhanced sentence.

The easiest, most effective method for addressing the ambiguous nature of the residual clause is to simply remove the clause from the Guidelines. By removing the controversial residual clause from the Guidelines, Congress would eliminate the ambiguity while still effectively enhancing sentences for violent, career offenders. The Guidelines would still recognize a violent crime as one that "(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, [or] involves use of explosives,"[160] but it would not require courts to rewrite the statute each time an unlisted,

153. Begay v. United States, 553 U.S. 137, 155 (2008) (Alito, J., dissenting).

154. Sykes v. United States, 131 S. Ct. 2267, 2284 (2011) (Scalia, J., dissenting).

155. James v. United States, 550 U.S. 192, 216 (2007) (Scalia, J., dissenting) (criticizing the lack of guidance in the majority's opinion).

156. H.J. Inc. v Nw. Bell Tel. Co., 492 U.S. 229, 249 (1989) (critiquing the poorly drafted Racketeer Influenced and Corrupt Organizations ("RICO") Act).

157. Mobley v. United States, 133 S. Ct. 888 (2013).

158. *See supra* notes 69–82 and accompanying text.

159. *See supra* notes 4–5 and accompanying text.

160. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(1)–(2) (2012).

potentially violent crime has been committed by a career offender. Judges would not have the discretion to improperly elevate possession to the level of an inchoate offense like the majority did in *Mobley*.[161]

Congress likely included the residual clause as a catch-all on which judges could rely to supplement the enumerated offense with those other, unlisted violent offenses. Most likely, Congress did not want to box itself into a corner where an unenumerated offense was so heinously violent that the offender could not be punished accordingly. While this rationale is reasonable, the subsequent application of the residual clause has resulted in the various muddled, disjointed standards put forth by the Supreme Court. Removing the residual clause would not allow an offender to avoid punishment. Rather, it simply requires that the offender of an unenumerated offense be punished for that crime without receiving an enhanced sentence. Moreover, the crossover between the violent felonies enumerated in section 4B1.2(a)(2) and the federal habitual offender laws indicates that courts could continue to issue increased punishments for repeat, violent offenders.[162] Not only does this crossover help to assuage any concerns that habitual violent offenders would not be punished for their recurrent criminal activity, but it also provides a starting point for Congress to augment the enumerated violent offenses in section 4B1.2(a) if it finds the current list of violent crimes subject to a sentence enhancement incomplete.

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161. *See supra* Part II.A.

162. *Compare* U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2012) (enumerating as a violent crime "any offense under federal or state law . . . that has as an element the use, attempted use, or . . . threatened use of physical force against . . . another, or is burglary of a dwelling, arson, or extortion, [or] involves use of explosives"), *and id.* § 4B1.2 cmt. n.1 (supplementing the enumerated offenses from section 4B1.2(a) by including as violent crimes "murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery[,] . . . extortionate extension of credit[,] . . . [and u]nlawfully possessing a firearm described in 26 U.S.C § 5845(a) (2006) (*e.g.*, a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun")), *with* 18 U.S.C. § 3559 (2006) (requiring mandatory life imprisonment for "a person who is convicted in a court of the United States of a serious violent felony" and defining a serious violent felony as "a Federal or State offense . . . consisting of murder," "manslaughter other than involuntary manslaughter," "assault with intent to commit murder," "assault with intent to commit rape," "aggravated sexual abuse and sexual abuse," "abusive sexual contact," "kidnapping," "aircraft piracy," "robbery," "carjacking," "extortion," "arson," "firearms use," "firearms possession," "or attempt, conspiracy, or solicitation to commit any of the above offenses," and "any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another").

Finally, this proposed rewrite has the added benefit of eliminating the increased discretion afforded sentencing judges in light of the post-*Booker* advisory nature of the Sentencing Guidelines. This rewritten version of section 4B1.2(a)(2) would effectively require the sentencing judge to answer "yes" or "no" to whether the committed offense is a violent crime. Either the crime "(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, [or] involves use of explosives,"[163] or it does not. There is no middle ground. However, the Guidelines as currently written give the sentencing judge the discretion to answer "maybe" under the residual clause and impute his or her preferred sentencing philosophy into the determination as to whether the crime is violent.[164]

CONCLUSION

In *Mobley*, the Fourth Circuit incorrectly concluded that possession of a shank by an inmate is a crime of violence subject to an enhanced sentence under the residual clause of section 4B1.2(a)(2) of the Federal Sentencing Guidelines. The *Mobley* majority wrongly used a utilitarian sentencing philosophy to reach this conclusion, and it was able to do so against the purpose of the Guidelines because of their post-*Booker* discretionary nature. The issue faced by the *Mobley* court is not limited to the Fourth Circuit, but rather contributes to a larger circuit split focused on the ambiguous nature of the residual clause. Furthermore, this circuit split exemplifies the trouble faced by lower courts when deciding whether particular, unenumerated crimes are indeed "violent crimes" as intended by Congress.

Finally, the unresolved ambiguity present in the residual clause of section 4B1.2(a)(2) is particularly unsettling because it infringes on the constitutional right of notice embodied in the Due Process Clause of the Fifth Amendment. Until Congress imputes the necessary clarity that the residual clause calls out for by eliminating that clause from the Sentencing Guidelines, defendants like Mobley will continue to hope that courts correctly apply the rule of lenity, a stopgap measure in the face of uncertainty in sentencing as the courts make impromptu judgments as to what constitutes a "violent crime."

163. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(1)–(2).

164. *See supra* Part I.

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